

\$38,570 in U.S. Currency, 950 F.2d at 1113; *\$191,910.00 in U.S. Currency*, 16 F.3d at 1058.

Here, claimant Simard had possession and made an unequivocal claim to the currency. (*Simard Decl.*). This is enough for standing under \$148,840.00, *supra* and at this early stage of the pleadings.

Doubts as to the credibility of the movant's affiants or witnesses may lead the court to conclude that a genuine issue exists. Indeed, as the Advisory Committee states in its Note to the 1963 amendment of Rule 56(e): "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." Assessing evidentiary weight and credibility are not ordinarily consistent with a ruling on a summary judgment motion. *Nyari v. Napolitano* 562 F.3d 916, 922 (8th Cir. 2009)

In this case, by ruling on the affidavits as the Court did in its order, it made credibility findings. This was improper.

VI. THE CLAIMANT WAS PRECLUDED FROM BRINGING A SUPPRESSION MOTION BECAUSE NO RULE 26 EXCHANGE OCCURRED OR A RULE 16 CONFERENCE DUE TO THE PENDING 12(b) MOTION TO DISMISS

The motion before the magistrate stayed the rest of the proceedings. It was impossible for counsel with the benefit of any discovery to bring a suppression motion and it is simply unfair the Court mentioned it in its opinion that none was brought. The motion to strike was pending for seven months. Both parties -- especially the government -- wanted to wait for the outcome of that motion.

DATED this 17th day of March, 2010.

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